No. 14,993

In the

United States Court of Appeals

For the Ninth Circuit

WILLIAM BERRYHILL,

Appellant,

vs.

PACIFIC FAR EAST LINE, INC., a corporation,

Appellee.

Brief for Appellee

Appeal From the United States District Court for the Northern District of California, Southern Division

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FACTS

Appellant, William Berryhill, a marine machinist, was employed by Todd Shipyards Corporation. Appellee, Pacific Far East Line, as operator of the steamship FLYING DRAGON, contracted with Todd to accomplish certain major repairs on the FLYING DRAGON, and for this purpose delivered the vessel to Todd's shipyard, Alameda, California, where it was placed in drydock. Todd sent three of its night-shift employees, including appellant on board the vessel, where they commenced work with a portable grinder and grinding wheel. Both were owned and furnished by Todd. While appellant was grinding on the vessel's main shaft pursuant

to Todd's instructions, the grinding wheel, for reasons unknown, suddenly flew apart, injuring appellant.

As specifically set forth in his Brief (pages 3-4), appellant claims damages solely on the theory that appellee as operator of the vessel must be held to have warranted the seaworthiness of the grinding wheel.

Appellant did not allege that appellee *negligently* failed to provide him a safe place to work or with safe tools. In fact, there is no suggestion that appellee could have prevented this injury. Appellant's theory of recovery hangs entirely on the premise that the shipowner warrants the seaworthiness of tools belonging to and used by a drydock owner to make major repairs, acting as an independent contractor, on the shipowner's vessel while in drydock at the drydock owner's yard.

SUMMARY OF ARGUMENT

Appellant as a shoreside machinist performing major repair work on a vessel in drydock cannot avail himself of the seaman's right to seaworthy tools because he is neither doing seaman's work nor undergoing a seaman's hazard. A shoreside repairman is a business invitee who may recover only on proof of negligence. In any event his own specialized repair tools, not being appurtenances of the vessel, are not covered by the doctrine of unseaworthiness.

ARGUMENT

The Doctrine of Shipowners' Liability for Unseaworthiness Does Not Apply to a Shoreside Machinist Assisting in Major Repairs on a Vessel in Drydock.

Appellee does not contest the general proposition of appellant that the shipowner's warranty of seaworthiness covers shoreside employees who perform work historically

that of a seaman. In *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 99 (1946), the Supreme Court held that stevedores are entitled to such warranty. The court said:

> "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew (citing cases)." *Sieracki* at page 96.

> "* * * (The stevedore) is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." *Sieracki* at page 99.

Appellant here is not a seaman because he was not doing seaman's work. On the contrary, he was assisting in the performance of major repair work on the ship's propeller shaft; work that could be done only in drydock and with use of the drydock owner's tools and methods, and pursuant to drydock supervision and instructions. In short, it was a shipyard job involving facilities not available on shipboard, and training far beyond that which a seaman has or ever did have. This work bears no resemblance, historical or otherwise, to the seaman's labors; nor is there any similarity in the hazards connected with minor repairs sometimes made by a seaman to those connected with "machine shop" work which appellant was performing.

The *Sieracki* case (supra) on which appellant places his principal reliance is grounded on the principle that since the stevedore does what formerly was the seaman's work, he should share the seaman's right to a seaworthy vessel and seaworthy appliances.

A vessel drydocked for repairs is withdrawn from commerce and, often her crew will be largely paid off, having only a skeleton crew for security reasons while specialists such as appellant take over. This is as true historically as it

is today. Vessels have always needed the continuing attention of their builders or ship repair yards having specially trained men and special equipment, to maintain them in a condition fit to carry cargo. Only when repairs are completed and the vessel again waterborne, can the seaman or the stevedore commence his work of loading, stowing, etc. intimately connected with the handling of cargo and the earning of freight money.

From the standpoint of function, a wide gulf separates the appellant here from the seaman and his present day in part substitute, the longshoreman.

Nor can it be said that we are confronted here with anything resembling an exposure to the hazards connected with an ordinary seaman's work. Appellant was working on board a vessel on land. Nothing attached to or used by the vessel caused his injury. The grinding wheel came from ashore and would be returned ashore when the job was completed. The only factual premise for appellant's cause of action presented to the court below or here is a geographical coincidence; that his grinding wheel happened to come apart in the shaft alley of appellee's vessel instead of ashore in his employer's machine shop.

Nothing in the language of *Sieracki* indicates an intention or suggests a reason to extend the scope of the doctrine of liability without fault to one so far removed from the hazards of a seaman's work as this appellant.

Pope and Talbot v. Hawn Does Not Hold Otherwise.

It is asserted by appellant that the Supreme Court in the recent case of *Pope and Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953), indicated an intention to extend the doctrine of the *Sieracki* case to all "repairmen".

Examination of the facts set forth by the Court of Appeals (CA-3 1952), 198 Fed. 2d 800 at 803, shows that Hawn was not a "ship repairman". Instead he was a ship's carpenter foreman employed to adjust the grain feeder boxes on board the Pope and Talbot vessel. These boxes are used in the bulk loading of grain. Actually, Hawn was performing the same functions pertaining to loading the vessel with grain that formerly a seaman and now stevedores ordinarily perform with other types of cargo.

The fact that Hawn was doing work quite similar to that of a stevedore and had a direct relation to the loading and handling of cargo in preparing the ship for her voyage was mentioned by each court that considered his case, and emphasized as the compelling reason for extending to him the warranty of seaworthiness.

The opinion of the District Court states:

> "Plaintiff was an employee of Haenn Ship Ceiling and Refitting Corporation, which had been engaged to prepare the ship to receive a cargo of grain by altering the grain feeders and erecting shifting boards * * *. The doctrine of seaworthiness applies to the plaintiff, whose duties had a direct relation to the proper loading and handling of the ship's cargo in preparation for a voyage." 99 Fed. Supp. 226 at 228-229 (E.D. Penna. 1951).

The Court of Appeals for the Third Circuit, in affirming, commented:

> "Hawn was admittedly * * * actually working in the ship, preparing it to receive a cargo requiring special provision for its storage, and was therefore rendering services necessary in the performance of the ship's business of carrying cargo. The difference between Hawn and the longshoreman in *Seas Shipping Co. v. Sieracki* is, *at most, one of slight degree.*" 198 Fed. 2d, 800, 803 (CA-3, 1952)

Finally, the Supreme Court in reciting the facts in comparison with those of the *Sieracki* case stated:

> "Sieracki's legal protection was not based on the name 'stevedore' *but on the type of work he did* and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain-loading equipment developed a *slight* defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on the voyage. All were entitled to like treatment under the law." 346 U.S. 406 at pages 412-413 (1953)

Nothing in this language, or elsewhere in the court's opinion, indicates a disposition to lay down any general rule as to repairmen. On the contrary the court's opinion warns against such construction of its holding. The character of the work is emphasized as the controlling factor, regardless of characterization of the worker. Coupled with this is the reference to the "slight" defect which Hawn was engaged in repairing, "so that the loading could go on at once" indicating the close relationship of the work to the actual operation of the ship was important, and emphasizing the fact that the repairs were slight in comparison to other repairs which might be described as major repairs, as in our case. It is plain that Hawn received the benefits of the warranty of seaworthiness solely because, like *Sieracki,* he was doing a seaman's work in substantially the same category as loading cargo and as a consequence was exposed to the seaman's maritime risk.

The remaining case cited by appellant, *Torres v. The Kastor,* 227 Fed. 2nd 664 (CA-2 1955), discussed the status

of a ship cleaner employed to sweep up the residue of a cargo of pitch and make the vessel ready again for general cargo. Nothing in the court's brief opinion or appellant's argument suggests that Torres was in the same category as one engaged in the major repair of the vessel itself. Cleaning a vessel's holds to receive new cargo has been and still is in many cases a seaman's work. This is common knowledge. For that reason Torres was entitled to a seaworthy vessel. Hold cleaning is not repair work. Therefore the court's description of the workers as repairmen is completely erroneous and evidently a careless misstatement.

Neither the facts set forth in appellant's pleadings nor the authorities discussed in his brief suffice to establish him as one who does seaman's work or is exposed to a seaman's hazards. It follows that appellant, as a drydock repairman, is in no way entitled to the status of a seaman or the seaman's warranty of seaworthiness.

We have already seen that appellant was a shoreside repairman working for a shipyard doing major repairs to a vessel, which brings us to the point of discussing what his rights are under the law.

Appellant Was a Business Invitee and as Such Entitled to Recover from the Shipowner if He Suffered Injuries Because of Negligence on the Part of Such Person. He Is Not However Entitled to the Warranty of a Seaworthy Vessel.

Berryhill is, of course, under the Longshoreman's and Harbor Worker's Compensation Act, 33 USC, Section 901 et seq. entitled to recover compensation and obtain hospitalization and medical service from his employer, Todds Drydock. As indicated, he is also entitled as a business invitee to recover from the shipowner if injured because of the latter's negligence, and as such his position is superior to

that of a worker who is injured on shore, in that contributory negligence of a business invitee on board vessel merely goes to mitigation of damages.

He is not, however, entitled to the warranty of a seaworthy vessel, and we have demonstrated that the cases cited by appellant fail to show that he is in the category of a seaman and entitled to such warranty. There are in fact several cases which indicate the contrary.

A case in point is *Petersen v. United States,* 80 Fed. Supp. 84 (E.D. NY 1947). Respondent's vessel was in a drydock for extensive repairs and alterations. Petersen, a repairman employed by the shipyard, was injured when a ship's chain broke in the course of the work. The court held:

> "Since libelant was not a member of the crew, or a stevedore *engaged in loading cargo,* but an employee of a contractor repairman, he was not entitled to a seaworthy ship on which to work. * * * Employees of a contractor remain 'business guests' and are not entitled to a seaworthy ship under the doctrine of *The Osceola,* 189 U.S. 158." (Page 88)

Again in *Meyers v. Pittsburgh Steamship Company,* 165 Fed. 2d, 642 (CCA-3 1948), a shipyard rigger was injured by a fall on ice created by the discharge of water from the defendant's vessel as it lay in drydock. The court declined to invoke the warranty of seaworthiness on plaintiff's behalf.

To the same effect are the holdings in *Guerrini v. United States,* 167 Fed. 2d 352 (CCA-2 1948), dealing with the status of a ship's boiler-cleaning man, and *Martini v. United States,* 192 Fed. 2d 649 (CA-2 1951), holding that the general superintendent of a shoreside repair company was owed no duty of seaworthiness.

The reason for the distinction between the seaman and the shoreside repairman is aptly stated in *Manera v. United States,* 124 Fed. Supp. 226 (E.D. NY 1954). Manera was employed by a subcontractor to clean certain tanks aboard respondent's vessel, which was in a shipyard for repair of bottom damage caused by grounding on a rock. He was injured allegedly because one of the ship's ladders was unseaworthy. While the court found that the ladder was not defective, it declared that Manera was not entitled to the warranty of seaworthiness:

> "Since he was not a seaman and was not exposed to the peril of descending from the 'tween deck into the lower hold while the ship was rolling or pitching on the high seas, the test to be applied was that of what a business guest would be entitled to exact from the ship while in the performance of such a task as he was engaged in while the ship was lying at this repair yard dock. It is believed that the foregoing is a correct statement in view of all that was written in *Pope and Talbot v. Hawn,* 346 U.S. 406." (Page 227).

If, as the above cases hold, the shipowner does not warrant the seaworthiness of his own property for the protection of all business invitees or guests, it follows that he should not be held to warrant the seaworthiness of property owned and controlled by third parties.

In Any Event, the Shipowner's Warranty of Seaworthiness Pertains Only to "The Proper Appliances Appurtenant to the Ship".

Even if the court should conclude that appellant does come within the class of workers entitled to the warranty of a seaworthy vessel, it does not follow that the grinding wheel being used by appellant at the time of the accident is one of the class of tools warranted seaworthy.

The classic definition of the doctrine of seaworthiness is set forth in *The Osceola,* 189 U.S. 158, 175 (1903):

> "* * * The vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of a ship or the failure to supply and keep in order the proper appliances appurtenant to the ship." (Page 175).

An appurtenance of the ship is something "pertaining to or belonging to the ship in the legal sense," Webster's Collegiate Dictionary, Fifth Ed. page 53.

Appellant is, under the law, required to plead and prove facts showing the grinding wheel should be treated as an appurtenance of the vessel when not owned or furnished by the vessel. The case of *Petterson v. Alaska Steamship Co.,* 205 F. 2d 478 (CCA 9th, 1953), affirmed 347 U.S. 396 (1954), does not hold otherwise. This court carefully pointed out that in that case that the unseaworthy block which injured Petterson was a "type of equipment commonly found as a part of the gear of both ship and stevedoring firms" (p. 479) and should therefore be considered equipment of the vessel. Here we are dealing with a repair tool used by a drydock machinist for the specialized task of grinding the vessel's main shaft keyway. In the circumstances it must be taken that such a tool was not one which "pertained to or belonged to the ship in the legal sense." Appellant admitted in answer to an interrogatory that he has no facts to prove that the grinding wheel was an appurtenance of appellee's vessel.

(Interrogatory)

> "2. Was the grinder and grinding wheel a part of the equipment and/or appurtenances of the steamship Flying Dragon?

(Answer)

> "As to the grinding wheel, plaintiff does not know if it was a part of the equipment and/or appurtenances of the steamship Flying Dragon. As to the grinder, no." (Tr. 17, Plaintiff's Answer to Defendant's Interrogatory 2.)

The mere fact that appellant's grinding wheel was required for the work in progress does not make it an appurtenance of the vessel.

In point is the recent case of *Fredericks v. American Export Lines,* 227 Fed. 2d 450 (CA-2 1955). Plaintiff, Fredericks, asserted that the vessel warranted the seaworthiness of a cargo skid affixed to a stevedore-owned shore structure because the skid was necessary to transfer cargo from the upper story of the pier to the vessel. The court answered this argument by stating:

> "Tools or equipment do not become part of a lessee's [the shipowner's] plant merely because such tools or equipment are indispensable to the work that an independent contractor has agreed to perform." (Page 454)

Similarly, the drydock which supported appellee's vessel was equally necessary to the work, but it could hardly be argued that the drydock was warranted to be seaworthy as an appurtenance of the vessel. By the same reasoning, no warranty of seaworthiness should attach to the specialized tools of the drydock owner which he furnishes for use by his workmen aboard the vessel. While there may be logic in holding that the shipowner warrants the adequacy of the nautical blocks and tackle used in the typically maritime task of loading the vessel as in the case of *Petterson,* this logic disappears when applied to the myriad tools and devices which the drydock owner may have at his disposal,

and which the shipowner does not ordinarily have in the operation of his vessel.

For the above reasons, regardless of appellant's status, the *Petterson* decision should not be extended to force this appellee and those in like circumstances to warrant the specialized tools of the drydock machinist, even if it be admitted for the sake of the point that appellant is in the category of a seaman.

CONCLUSION

For the reasons shown, the judgment of the court below should be affirmed.

Dated at San Francisco, California, June 8, 1956.

Respectfully submitted,

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